BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DARRICK CHINN	)	
Claimant	)	
	)	
VS.	)	
	)	
LIBERTY PROPERTY, LLC	)	
Uninsured Respondent	)	Docket No. 1,028,406
	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	
	)	

ORDER

Respondent requested review of the January 3, 2008 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on March 28, 2008.

APPEARANCES

Phillip B. Slape, of Wichita, Kansas, appeared for the claimant. Kirby A. Vernon, of Wichita, Kansas, appeared for respondent. James R. Roth, of Wichita, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties stipulated that the 5 percent permanent partial impairment to the whole body awarded by the ALJ is not in dispute and can be summarily affirmed. Likewise, the parties agree that *if* the Board determines that claimant is entitled to a permanent partial general (work) disability, there is no dispute as to the ALJ's finding with respect to a 44 percent wage loss. Finally, the parties also stipulate that based upon the present record, respondent is capable of paying any Award in this matter and the Fund presently has no liability.

ISSUES

The ALJ concluded "the claimant was not terminated [from his job with respondent] for willful misconduct"[1] and was therefore entitled to a 32.5 percent permanent partial general (work) disability based upon a 21 percent task loss and a 44 percent wage loss. The ALJ went on to assess the entire liability for this Award against respondent after concluding that respondent is "not insolvent"[2]

Respondent has appealed the ALJ's conclusion that claimant is entitled to an award in excess of his functional impairment.[3] Respondent contends that claimant was terminated from his employment as a result of unsatisfactory job performance and his resulting termination for what amounts to a lack of a good faith effort to retain his employment precludes any award beyond a functional impairment. Alternatively, respondent argues that any work disability award should reflect a zero percent task loss as suggested by Drs. Hubbard and Dobyns, thus decreasing the claimant's award to 22 percent work disability.

Although it has no present liability in this matter, the Fund generally concurs with respondent's legal arguments contained within its brief and advanced at oral argument before the Board.

Claimant argues that the Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be affirmed in all respects.

The Board finds the ALJ's findings and conclusions are accurate and supported by the law and the facts contained in the record. It is not necessary to repeat those findings and conclusions in this Order. The Board approves those findings and conclusions and adopts them as its own.

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[1] ALJ Award (Jan. 3, 2005) at 5.

[2] *Id.*; K.S.A. 44-532a.

[3] As noted above, the parties have agreed that the 5 percent functional impairment found by the ALJ is not in dispute.

The sole issue presented in this appeal is whether claimant's termination for "unsatisfactory job performance"[4] prevents him from receiving a work disability. The Board notes that the test of whether a termination disqualifies an injured worker from entitlement to a work disability remains one of good faith, on the part of both claimant and respondent.[5]

A literal reading of K.S.A. 44-510e would indicate claimant is entitled to receive a permanent partial general disability based upon his wage loss and his task loss. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But the appellate courts have not always followed the literal language of the statute. Instead, the courts have, on occasion, added additional benchmarks for injured workers to satisfy before they become entitled to receive permanent disability benefits in excess of the functional impairment rating. For example, *Foulk*[6] and *Copeland*[7] held that workers must make a good faith effort to work or to find appropriate employment after their injuries before they are entitled to receive a work disability under K.S.A. 44-510e. And if the injured worker fails to prove good faith to find appropriate work, a post-injury wage must be imputed.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[8]

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[4] Respondent's Brief at 1 (filed Feb. 13, 2008).

[5] *See Helmstetter v. Midwest Grain Products, Inc.,* 29 Kan. App. 2d 278, 28 P.3d 398 (2001) and *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[8] *Id.* at 320.

Assuredly, the concepts of good faith effort and imputing wages are neither mentioned in K.S.A. 44-510e or any other statute in the Act.

In *Ramirez*[9], the Kansas Court of Appeals again departed from the literal language of K.S.A. 44-510e and held a worker who had injured his upper extremities was not entitled to a work disability because the worker had failed to disclose an earlier back injury in a pre-employment application. But the Act contains no provision that an incomplete or erroneous pre-employment application precludes an award of work disability. Indeed, the injured worker in *Ramirez* probably felt the court's holding was especially punitive as the injury that was not disclosed in the pre-employment application was not related in any manner to the injury he later sustained.

And in *Mahan*[10], the Kansas Court of Appeals held that when an employee has failed to make a good faith effort to retain his or her current employment, *any* showing of the potential for accommodated work at the same or similar wage rate precludes an award for work disability.

> We hold that where the employee has failed to make a good faith effort to retain his or her current employment, a showing of the *potential* for accommodation at the same or similar wage rate precludes an award for work disability. It would be unfair under circumstances where the employee has refused to make himself or herself eligible for reemployment to require the employer to show that the employee was specifically *offered* accommodated employment at the same or similar wage rate.[11]

Again, the Act contains no such provision that failing to make a good faith effort to retain employment is a valid defense to a claim for disability benefits. Indeed, in *Oliver*[12] the Kansas Court of Appeals held that neither K.S.A. 1998 Supp. 44-510e(a), nor Kansas case law required an injured worker to always seek post-injury accommodated work from his or her employer before seeking work elsewhere. And in *Rash*[13], the Kansas Court of Appeals held the offering or accepting of accommodated employment was simply another factor in determining whether the employee had engaged in a good faith effort to seek appropriate employment.

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[9] *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999).

[10] *Mahan v. Clarkson Constr. Co.*, 36 Kan. App. 2d 317, 138 P.3d 790, *rev. denied* 282 Kan. ___ (2006).

[11] *Id.* at 321.

[12] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[13] *Rash v. Heartland Cement Co.*, 37 Kan. App. 2d 175, 154 P.3d 15 (2006).

> Heartland would have us punish employees with a harsher result for not accepting accommodated employment. This argument is contrary to *Oliver*. The lesson from *Oliver* is that an employer is not required to offer accommodated employment. Equally, an employee is not required to accept an offer of accommodated employment from his or her employer. The offering or accepting of accommodated employment is simply another factor in determining whether the employee has engaged in a good faith effort to seek appropriate employment. An employee who rejects an offer of accommodated employment has a good faith duty to seek appropriate employment within his or her restrictions. If the employee fails in this effort, "the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages." *Copeland*, 24 Kan. App. 2d at 320.[14] (Emphasis added)

The Kansas Supreme Court, however, has recently sent two strong signals that the Act should be applied as written. In *Graham*[15], the Kansas Supreme Court rejected an interpretation of the wage loss prong in the work disability formula that did not comport with the literal reading of K.S.A. 44-510e. The Kansas Supreme Court wrote, in part:

> When a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statute's language is clear, there is no need to resort to statutory construction.[16]

Moreover, in *Casco*[17], the Kansas Supreme Court overturned 75 years of precedent on the basis that earlier decisions did not follow the literal language of the Act. The Court wrote:

> When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute.[18]

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[14] *Id.* at 185.

[15] *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

[16] *Id.* at Syl. ¶ 3.

[17] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007), *reh. denied* (May 8, 2007).

[18] *Id.* at Syl. ¶ 6.

Even the Court of Appeals has recognized this change in approach in its recent decision in *Grether*[19] when that particular panel noted that strict construction is now mandated.

Despite the Kansas Supreme Court's clear signals to follow the literal language of the Act, it is not for this Board to substitute its judgment for that of the appellate courts and the case law that has resulted. Consequently, the Board is compelled by the doctrine of stare decisis to follow the law set forth in *Copeland* and its progeny.

Here, the ALJ concluded that claimant "was not terminated for willful misconduct" and that he was therefore entitled to a work disability award. The Board agrees. At the time of his termination, claimant was still undergoing treatment for his injury and had just received work restrictions. This fact alone might account for the fact that claimant was working slower and less productive in the last weeks of his employment. Moreover, there is precious little evidence within the record that supports respondent's contention that claimant's termination was due to unsatisfactory job performance. The one document that respondent offers is dated May 25, 2006 but there is no evidence that the document was actually given to claimant. The document was apparently authored by another individual who did not testify in this case. Moreover, the document itself appears to be more of an internal report to management rather than any sort of reprimand or counseling effort to be used with employees. And again, there is no evidence that this document was given to claimant or that the contents of the documents were shared with him in any way.

Claimant testified that he was given his check on June 30, 2006 and included within that envelope was a termination notice. According to claimant, before that point in time there was no indication that his job was in jeopardy or that his performance was less than acceptable. And while there is some evidence within the record that complaints were lodged against claimant for inappropriate behavior at some ill-defined point in time, these allegations are unsupported by first hand testimony or corroborating testimony or documents. If, as respondent suggests, claimant had been accused of rummaging through tenant's belongings while in their apartments and of taking items, it is difficult to see why respondent's *only* response would be to transfer claimant to another apartment complex.

Like the ALJ, the Board agrees that claimant was not terminated for willful misconduct or a lack of good faith effort to perform his job with respondent. And as a result, he is entitled to a permanent partial general (work) disability under K.S.A. 44-510e(a). The parties have stipulated to a 44 percent wage. But there is a disagreement as to the appropriate task loss.

Dr. Stein is the only physician to assign permanent restrictions and when considering the job task list, he opined that claimant had a 21 percent task loss. Dr.

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[19] *Grether v. Cox Communications*, No. 97,580, 177 P.3d 428, 2008 WL 588157 (Unpublished Court of Appeal Opinion filed February 29, 2008).

Hufford testified that he had a "rather lengthy"[20] conversation with the claimant about work restrictions and it is quite clear that the physician was concerned about the effect permanent working restrictions would have on claimant's vocational efforts and future employment. Thus, he agreed not to impose any restrictions. Dr. Dobyns did not specifically assign any restrictions and it appears that was more as a result of his conclusion that claimant sustained no permanent impairment and thus, had no limitations, rather than an independent conclusion that claimant required no restrictions as a result of his injury.

Dr. Stein, on the other hand, reviewed the job task analysis and opined that based upon that list, he concluded claimant sustained a 21 percent task loss and that conclusion was adopted by the ALJ. The Board agrees. Claimant resulting work disability is 32.5 percent and as such, the ALJ's Award should be affirmed in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated January 3, 2008, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of April 2008.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Phillip B. Slape, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent
James R. Roth, Attorney for the Fund
Nelsonna Potts Barnes, Administrative Law Judge

[20] Hufford Depo. at 22.